

CURRENT DEVELOPMENTS

International Law – So 90s?

On periodization and the 1990s as crystallization point for contemporary International Law

ALICIA KÖPPEN — JULIEN BERGER — 27 April, 2016



The international legal order finds itself in turmoil. The crises in Ukraine and Syria, the questioning of the authority of the ECtHR, the opposition against the ICC by African states and the rise of global terrorism can all be interpreted as crisis symptoms justifying the need for a (re-)assessment of the current state and future of International Law.

Every reassessment needs an orientation point from which to carry out evaluations and make predictions; every assessment of change needs a comparison to an earlier stage.

When it comes to International Law, the orientation point could be the beginning of the 1990s. This was proposed by the organizers of the opening conference of the Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?” held in Berlin from 14th – 16th April 2016. 1990 marks the end of the Cold War and the end of bipolarity of the world order. According to Andreas Zimmermann, one of the founding members of the Research Group, in the 1990s something happened: the proliferation of international courts and tribunals, among those the ICC, the rise of environmental law with *inter alia* the conclusion of the UNFCCC, the rise of the ECtHR and of human rights in general, the creation of the WTO etc. etc.

Historians are familiar with the exercise of periodization – maybe even too familiar as, bluntly put by conference participant Felix Lange, it seems like “every historian is supposed to come up with his or her own periodization”. However, in the face of the above mentioned crisis symptoms there appears to be a current need for international lawyers to engage in this exercise and to determine relevant fix points in the evolution of International Law. While there was no single conference panel dedicated to the question of either periodization in general or the specific question of 1990, the topic repeatedly arose.

Felix Lange’s contribution to the first panel “Historical perspectives” served as a basis for further debate. He presented a general periodization of International Law based on the historical milestones of the Peace of Westphalia in 1648 – commonly identified as the hour of birth of International Law –, the 1815 Congress of Vienna, the creation of the League of Nation in 1919, the establishment of the United Nations in 1945 and eventually the end of the Cold

War in 1990. With this account he was in line with the conference organizers who in their introduction chose the decade starting with 1990 as their point of reference.

Jan Wouters' quantitative analysis of international lawmaking emphasized that International Law was on the rise after the end of the Cold War, thereby supporting the organizers' proposition. He showed that formal lawmaking, ie. the conclusion of treaties, reached its peak in the 1990s and started to stagnate if not decline since the 2000s. Also, the notion of non-state actors became a serious topic of research for international lawyers in the post 1990 era, while recently the interest seems to have faded. The period after the end of the Cold War was marked by an unprecedented consensus that International Law was undergoing a process of pluralization as well as an emphasis on value-orientation of the international legal order.

Whose International Law?

But the choice of the 1990s as a period of comparison did not remain uncontested. The decolonization in the 1960s and the reassertion of western hegemony in the 1970s with the revival of neo liberalism and military intervention were named as alternative tipping points of the international legal order. 1990 as point of reference for the assessment of International Law's development was criticized as eurocentric if not germanocentric. This critique points to the underlying question: Whose periodization? And to the essential and inextricably linked one: Whose International Law? Andrew Hurrell and Benedict Kingsbury were among those pressing the need to consider alternative narratives of International Law as well as to focus on underlying and preceding structures laying the basis for developments that manifested themselves from 1990 onwards.

Is periodization even legitimate?

The need to find a point of reference was widely shared by the conference participants. Even so, some fundamental scepticism was voiced over the legitimacy of periodization in general. Eyal Benvenisti reminded the participants of Joseph Weiler's "Geology": Does change in International Law really mean the birth of a new epoch at the expense of another, as periodization and the corresponding image of a "timeline" could be interpreted – or don't the old layers rather continue to exist alongside new ones?

For his part, Andrew Hurrell was among those stressing the "dangers of presentism" with its inherent tendency to describe one's own time as epochal. Past pessimistic assessments of the state of International Law, such as Joseph Kunz' "The Swing of the Pendulum" written in 1950 or Thomas Franck's "Who killed Article 2 (4)?" of 1970 seem to confirm this impression.

While this criticism certainly bears a certain truth, taking it too seriously would mean that the question question on the rise or decline of International Law would not deserve to be asked. However, the conference participants, even those expressing this criticism, seemed to agree on the legitimacy and necessity of such a research question and hence, on the corresponding need for (historical) periodization.

The debate revealed and emphasized once more the imperative of determining fixed points for any comparative analysis. This applies above all to such delicate questions as those asked by the Research Group. Nevertheless, the right timeframe to rely on for the assessment of the rise or decline of the international rule of law could not definitely be established by the participants of the conference. However,

to say it with Winston Churchill, it seems that 1990 is the worst date to base a comparative assessment on, except for all the others.

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EDWARD MARTIN

27 April, 2016 at 09:48 (Edit) – Reply

Liebe Alicia,

zunächst Danke für diesen Beitrag. Man hat einen guten Einblick in eure Diskussionen erhalten.

Jedoch habe ich mich gefragt, ob ihr die Frage der Perspektive (Whose International Law?) wirklich ernst genommen habt. Insbesondere die Fixierung der Geburtsstunde des Völkerrechts am Westfälischen Frieden finde ich problematisch. Für Europa war dieses Ereignis zweifelsohne prägend. Wer hat jedoch auf dem südamerikanischen Kontinent, in Süd-Ost Asien oder auf dem afrikanischen Kontinent im Jahre 1650 (oder im Jahre 1750) das Jahr 1648 als prägendes Ereignis für das Zusammenleben/-wirken von sich konstituierenden Einheiten empfunden? Die gleiche Frage stellt sich mir für den Wiener Kongress.

Ob man nun die 1990er oder die Zeit der Dekolonialisierung als Referenzpunkt nimmt, die grundsätzlichen Fragen, die fundamentalen rechtlichen Prinzipien, sind, wie in eurem Beitrag angemerkt wurde, europäisch.

Euer Artikel hat die Tags “History of International Law” und “International Legal Theory”, weshalb ich mir die Frage erlaube, was macht das Völkerrecht zu Recht? Warum ist es bindend? Falls die Antwort darauf Selbstverpflichtung aufgrund der Souveränität lauten sollte, würde ich die Frage anschließen: kommt das Souveränitätsverständnis nicht eben von genau diesem Westfälischen Frieden? Und wurde die Fähigkeit als Entität souverän handeln zu können noch vor nicht allzu langer Zeit an einen “standard of civilization” geknüpft?

Über eine Antwort würde ich mich freuen.

Grüße aus Hamburg,
Edward Martin



EDWARD MARTIN

28 July, 2016 at 11:59 (Edit) — Reply

Sehr geehrter Herr Berger,

vielleicht können Sie mir meine Frage beantworten?

Mit freundlichen Grüßen,
Edward Martin

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